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ORIGINAL

EX PARTE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M St. NW -- Room 222
Washington, D.C. 20554

Re: **EX PARTE** in CC Docket No. 97-211

Dear Ms. Salas:

On August 18, 1998, representatives from MCI, WorldCom, and Cable & Wireless, Inc. met with the following Commission staff assigned to the above-captioned docket: Michelle Carey, Tom Krattenmaker, Don Stockdale, Michael Kende, Jennifer Fabian, Matthew Nagler, Staci Pieser, and Tony Bush. Representing MCI were Jonathan B. Sallet and Mary Brown. Representing WorldCom were Cathy Sloan and, from Swidler and Berlin, Andrew Lipman. Rachel Rothstein, from Cable & Wireless, Inc. attended that portion of the meeting dealing with issues related to the sale of MCI's Internet business to Cable & Wireless plc.

There were two substantive issues discussed that, in MCI's and WorldCom's view, would benefit from additional information and clarification: (1) a set of issues surrounding MCI WorldCom's plans for local service, the background of how local networks developed, and specific issues about the companies' marketing practices; (2) additional information and argumentation to supplement the August 10, 1998 ex parte to Michelle Carey explaining MCI's views that its sale of transmission capacity to Cable & Wireless plc is private carriage.

Local networks and operations

MCI has historically taken the view that fiber is not a viable delivery mechanism for the delivery of telephone service to mass-market residential customers. MCI has always intended to serve residential and small business customers via unbundled loops, recombination of network elements, and resale. Therefore, our fiber deployment has been independent of any residential marketing plans.

Accordingly, MCI has deployed fiber based on considerations that relate exclusively to business customers. MCI chose the locations of its deployed fiber by considering how to reach (I) its existing base of business customers and (ii) locations,

like business parks, where rapid growth of business customers could be expected. Because MCI did not view fiber as a mechanism of reaching a broad base of residential customers, its deployment of fiber had no correlation to the nature of residential neighborhoods.

As noted above, fiber was not originally intended, and is not now envisioned, as a primary mechanism for delivery of service to the mass market for residential subscribers. However, MCI and WorldCom have identified fiber as an additional distribution channel that will permit us to serve some multiple dwelling units (MDUs). This will be done on a targeted basis, much as other telecommunications service providers (SMATV and wireless cable operators, cable companies providing telephony or high-speed Internet services) currently deploy their services to MDUs. MCI WorldCom's ability to reach MDUs from its network will work to the particular advantage of city centers, since our local networks were originally deployed to serve business customers, including those located in center cities. *See, e.g.,* Declaration of Dennis W. Carlton and Hal S. Sider, January 25, 1998 at para. 9; Second Joint Reply of WorldCom, Inc. and MCI Communications Corporation, March 20, 1998, at 13; Declaration of Ronald R. Beaumont, filed July 8, 1998, at paras. 3-4.

One party has made allegations in the record that MCI WorldCom will sell or market its services in a discriminatory way. It has never been MCI's or WorldCom's practice or policy, it is not their policy or practice now, nor will it be their policy or practice in the future, to racially discriminate in the sales, marketing, or provisioning of telecommunications services. MCI and WorldCom are not aware, and parties have not cited, a single case where a potential customer claims to have been discriminated against due to race. This should come as no surprise -- MCI's and WorldCom's business, quite simply, is to sell telecommunications services to as many people and businesses as we are able. Stated differently, there is every economic incentive for the company and its sales, marketing, provisioning, and other employees to be racially neutral and that has been our practice.

C&W agreement constitutes private carriage

MCI and Cable & Wireless plc (C&W) have entered into a contractual agreement in which C&W will acquire MCI's Internet business. Unlike most business transactions, this divestiture occurred at the conclusion of a merger review by the competition authorities, namely, the U.S. Department of Justice (DOJ) and the European Commission. The divestiture is a direct outcome of the competition authorities' review of the proposed merger of MCI and WorldCom, itself an Internet

services provider through its subsidiary, UUNET.

The divestiture agreement reached between MCI and C&W includes provisions that permit C&W to lease transport services that specifically support the existing Internet offerings that C&W is purchasing from MCI. The lease is for a two-year term that can be extended an additional three years, and includes a provision allowing C&W to purchase additional transport facilities necessary to support projected growth in Internet traffic that C&W may experience. The agreement also provides for Internet network asset sales, right of use of unregulated software, assignment of Internet addresses to C&W, and collocation rights that permit C&W to maintain equipment in MCI facilities. Other nonregulated assets, as well as pertinent terms and conditions, are reported in MCI's Reply Comments, filed July 15, 1998 in the above-captioned docket.

Most of the particulars of the agreement between MCI and C&W go to issues that are not even arguably tariffable under Title II -- the one-time sale of equipment (such as routers), the transfer of peering agreements, transfer of employees, transfer of customers, assignment of Internet addresses, etc. In addition, the provision allowing C&W to collocate equipment in MCI's facilities is specific to the location of equipment to support the provision of Internet services, and not a general collocation offering similar to the Telecommunications Act's legal requirements that incumbent local exchange carriers provide collocation for the purpose of allowing local competitors to provide local exchange service. See Section 251(c)(6). With respect to the collocation provisions, no party to this proceeding has contended that collocation must be made available on a common carrier basis.

The issue that appears to have been raised by one opponent to the WorldCom-MCI merger is whether MCI's offering of transmission capacity to C&W under the divestiture contract should be tariffed. MCI maintains that the sale of transport capacity to C&W is restricted to the highly unusual arrangement (i.e., a divestiture whose purpose was to resolve pending investigations by competition authorities), and is specific to support the Internet business that is being transferred to C&W. Furthermore, the transmission component of the divestiture agreement is part and parcel of the larger agreement, in which C&W will pay $1.75 billion to acquire the entirety of MCI's Internet business. Separating the transmission component from the remainder of the contract, and requiring MCI to tariff it for other similarly-situated customers, isolates one economic aspect of the arrangement while ignoring its interplay with numerous other terms and conditions.

The decision by a carrier to offer transmission capacity to another entity does not create a tariffable event. The long-standing definition of common carriage requires that the carrier undertake to hold out its service to the public indifferently. National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 643 (D.C. Cir. 1976) (NARUC I), cert. denied, 425 U.S. 992 (1976). See also National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976)(NARUC II) (second prong of common carriage is that customers transmit information of their own design and choosing). In the MCI-C&W contract, there is no such "holding out to the public." MCI is leasing the specific transmission arrangements that are necessary to support C&W's Internet business going-forward. Additionally, C&W is simply acquiring the right to lease capacity, and may decide, for example, to transfer traffic to its own network.

Significantly, a carrier that operates as a common carrier for some purposes can operate as a private carrier for other purposes. "Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier." Southwestern Bell Telephone Company v. FCC, 19 F.3rd 1475 (D.C. Cir. 1994) (local exchange carriers that had filed individual case basis tariffs for dark fiber, and that were seeking to withdraw those tariffs at the same time the Commission was exploring the requirement of a generally-available tariff for dark fiber, are not common carriers and may not be required to file general tariffs); NARUC II, 533 F.2d at 608. See also Pitsch, Peter K. and Bresnahan, Arthur W., "Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative," 48 Fed. Comm. Law Journal No. 3 (noting that the definitions of "telecommunications carrier" and "telecommunications service" in the 1996 Act appear to codify common law "that a single entity may be subject to common carrier regulation in providing some services but not others."). The article is posted at: http://www.law.indiana.edu/fclj/pubs/no3/pitsch.html.

As the Court recognized with respect to incumbent local exchange carriers in Southwestern Bell, MCI in the C&W agreement is choosing to engage in private carriage. While MCI does, in fact, offer transport on a common carrier basis in other contexts, its decision to do so does not force it into the "common carrier" definition for all purposes. See also Public Service Company of Oklahoma Request for Declaratory Ruling, 3 FCC Rcd 2327, 2329 (1988)(irrelevant for private carriage analysis that the

service at issue is substitutable for one offered by common carriers).

The Southwestern Bell case notes that there might exist a "specific regulatory compulsion" that the Commission could rely on to regulate an entity as a common carrier. To determine whether such a regulatory compulsion exists, the Commission has historically followed an analysis that, on the facts of the MCI-C&W case, indicates that the private carriage label is correctly applied. In NorLight, the Commission granted a Petition for Declaratory Ruling asking that NorLight be declared a private carrier, finding that (1) there was plenty of transmission capacity available in the industry to satisfy the needs of carriers or end users who wanted to lease fiber capacity; (2) as a nondominant carrier, NorLight lacked any market power with respect to transmission capacity, (3) NorLight would engage in customer-specific negotiations resulting in contracts tailored to individual customer needs, (4) the customers were sophisticated and could ably represent their own interests in negotiations, and (5) the contracts would be long-term in nature. NorLight, 2 FCC Rcd 132 (1987), aff'd 2 FCC Rcd 5167 (1987).

The NorLight case illustrates the Commission's analysis in determining whether to require a carrier to treat an offering as common carriage. Applying the analysis there to the facts of this case, there are scores of common carriers selling transmission capacity, and even more entities (including power companies) selling capacity under private agreements. Any competitor to C&W has dozens of transmission suppliers from which to choose, with new entrants significantly enlarging transport capacity this year and next. *See, e.g.,* Joint Reply of WorldCom, Inc. and MCI Communications Corporation to Petition to Deny and Comments, January 26, 1998 at pp. 29-30, 34-39, 59-60 and 62-64; Second Joint Reply of WorldCom, Inc. and MCI Communications Corporation, March 20, 1998 at pp. 29-40, 56-59. *See also* the May 26, 1998 written ex parte filed by Robert S. Koppel, Vice President, International Regulatory Affairs, WorldCom, Inc. As to the market power issue, it is self evident that the existence of numerous alternative transport providers, the nondominant status of MCI, and the Commission's own decision to label as nondominant by far the largest long distance carrier in the long distance services market, is compelling ground to find that MCI cannot exercise any market power in the lease of transmission capacity to C&W. As a result, there is no basis to conclude that there is any "regulatory compulsion" to designate MCI as a common carrier with respect to its lease of transmission capacity to another entity. Compare this with Southwestern Bell, where dominant carriers were offering dark fiber to end user customers, and the court determined that the Commission had not met its burden of demonstrating that a common carrier designation was warranted.

There is no merit to the argument, suggested by Telstra in its August 14, 1998 ex parte, that the filed rate doctrine and Section 203 of the Communications Act require MCI to tariff the transmission component of its contract with C&W. Telstra fails to acknowledge the long-standing precedent that defines common carriage versus private carriage, and even the Commission's own history of examining the specific market at issue to determine whether to compel a generally-available offering. Moreover, there is no doubt as to the unique and singular nature of this contract, given its origin in the antitrust reviews.

Telstra's additional argument, that any favorable international private line terms that C&W obtains through its contract must be scrutinized publicly, similarly should be rejected. As discussed above, the divestiture of MCI's Internet business, including the transmission lease provisions, is the result of an antitrust review.

Other matters

In addition to the substantive discussions above, the companies discussed the sufficiency of the record with respect to the sale of MCI's Internet business to C&W plc.

Sincerely,

Larry A. Blosser

cc: Michelle Carey
Tom Krattenmaker
Chairman Kennard
Commissioner Ness
Commissioner Powell
Commissioner Furchtgott-Roth
Commissioner Tristani